PD-0790-20
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 2/17/2021 5:11 PM
Accepted 2/23/2021 1:01 PM
DEANA WILLIAMSON
CLERK

No. PD-0790-20

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
2/23/2021
DEANA WILLIAMSON, CLERK

ROBERTO ESCOBAR HERNANDEZ,
Appellant

v.

THE STATE OF TEXAS,
Appellee

On appeal from the County Court at Law
of Navarro County, Texas
In Trial Cause No. D38732-CR
No. 10-19-00252-CR

APPELLANT'S RESPONSE TO STATE'S BRIEF

ORAL ARGUMENT NOT REQUESTED

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TO THE HONORABLE COURT OF APPEALS:

COMES NOW Appellant, Roberto Escobar Hernandez, and submits that the court of appeals was correct in its analysis that the trial court abused its discretion in refusing appellant's request for a lesser included offense instruction.

STATEMENT REGARDING ORAL ARGUMENT

This Court has granted oral argument.

STATEMENT OF THE CASE

Appellant was charged by indictment with aggravated sexual assault of a child, in violation of Tex. Penal Code § 22.021(A)(2)(B). (CR: P19). Appellant entered a plea of not guilty to the charge as alleged (RR: V1, P19). Appellant elected to testify on his own behalf. (RR: V4, P7). The complaining witness testified that her father, Appellant, inserted his penis into her mouth (RR: V3, P108-109). During his testimony, Appellant conceded that he did touch the complaining witness inappropriately with the intent to arouse his sexual desire. (RR: V4,P18-19). Appellant further testified that he then pulled his pants down and pulled the complaining witness in close to him. (RR: V4,P21). Appellant also testified that he never inserted his penis into the mouth of the complaining witness (RR: V4,P21).

ISSUE PRESENTED

The trial court erred in denying Appellant's request for an instruction in the charge to the jury on the offense of indecency with a child by contact.

STATEMENT OF FACTS

Appellant was charged by indictment with aggravated sexual assault of a child, in violation of Tex. Penal Code § 22.021(A)(2)(B). (CR: P19). Appellant entered a plea of not guilty to the charge as alleged (RR: V1, P19). Appellant elected to testify on his own behalf. (RR: V4, P7). The complaining witness testified that her father, Appellant, inserted his penis into her mouth (RR: V3, P108-109). During his testimony, Appellant conceded that he did touch the complaining witness inappropriately with the intent to arouse his sexual desire. (RR: V4,P18-19). Appellant further testified that he then pulled his pants down and pulled the complaining witness in close to him. (RR: V4,P21). Appellant also testified that he never inserted his penis into the mouth of the complaining witness (RR: V4,P21).

Appellant put forth a plausible explanation for why it was that the complaining witness may have been confused about what had actually transpired, which was that her brother had engaged in similar conduct with her shortly before this event took place. (RR: V3,P47-49).

At the close of testimony, the charge conference was held. (RR: V4,P106). The original charge as proposed by the court included indecency with a child as a lesser included of aggravated sexual assault of a child, to which the State objected (RR: V4,P106). The court ultimately denied Defense counsel's request for the lesser included to be included in the charge and the original version of the charge, including the lesser, was introduced into the record for preservation of the issue. (RR: V5,P9-10).

SUMMARY OF ARGUMENT

The court of appeals properly concluded that the trial judge abused his discretion in failing to put before the jury a charge on the lesser included offense of indecency with a child by contact.

ARGUMENT

Article 37.09 of the Texas Code of Criminal Procedure governs what constitutes a lesser included offense and provides that an offense is a lesser included offense if:

(1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged;

(2) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission;

(3) it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission; or

(4) it consists of an attempt to commit the offense charged or an otherwise included offense.

The Court of Criminal Appeals has already had before it the issue of whether or not indecency with a child by contact is a lesser included offense of aggravated sexual assault of a child, and has held that it is a lesser included offense, when the conduct arises out of the same act. Evans v. State, 299 SW 3d 138 at 143 (Tex.Crim.App. 2009). In the case at bar, only one act was put into issue, which is what took place within a matter of a brief couple of minutes, on the day in question, in the place referred to in trial as "the container".

The court in Ochoa reviewed what constituted an "act". In that case, the indictment referenced five different dates that assaults were alleged to have taken place and anything that occurred during a particular date of offense was considered to have taken place as part of "the same transaction". Ochoa v. State, 982 SW 2d 904 (Tex.Crim.App. 1998). It was further explained that since each date constituted a single transaction, Appellant could not be convicted of both the greater and lesser

offenses, concluding that indecency with a child is a lesser included offense of aggravated sexual assault of a child. Id at 908.

Once determining that an offense is a lesser included, the second step in the analysis of whether that issue should be brought to the jury is whether there is some evidence before the jury that would support a finding of the lesser included offense. Guzman v. State, 188 S.W.3d 185, 188-89 (Tex.Crim.App. 2006); Hall, 225 S.W.3d at 536. Clearly that is the case here, as the Appellant testified as such in trial.

Further, the evidence should establish the lesser included offense as "a valid, rational alternative to the charged offense." Hall, 225 S.W.3d at 536; see Segundo v. State, 270 S.W.3d 79, 90-91 (Tex.Crim.App. 2008). That was also done in the case at bar, as the testimony in trial was that the shortly before this incident, the complaining witnesses' brother had assaulted her in the way she accused Appellant of.

Appellee asserts that the court of appeals erred in reversing the conviction and engaged in a lengthy analysis explaining that the different body parts of the complaining witness being involved constitutes different offenses. This court has held that touching (sexual contact) is a lesser form of penetration. Evans v. State, 299 S.W.3d 138, 142 (Tex.Crim.App.,2009).

The underlying decision in Evans engaged in this analysis: "We note that the State argues there was evidence that allowed the jury to reasonably infer that Evans

not only caused C.C.'s sexual organ to penetrate Evans's mouth, but also that Evans touched C.C.'s sexual organ. Specifically, the State contends that the jury could reasonably infer Evans touched C.C.'s genitals as he pulled down C.C .'s pants, as he prepared to perform oral sex on C.C, and as he put C .C.'s genitals in his mouth. We do not agree. The evidence shows only one sexual act, not separate and distinct sexual acts. See Martinez, 2006 WL 2612517, at 4. Therefore, because there was evidence of only one sexual act committed by Evans, we hold that Evans's rights under the Double Jeopardy Clause were violated." Evans v. State, 2008 WL 4862551, at 3 (Tex.App.-San Antonio,2008).

In analyzing the above, this Court considered that the legislature did not intend to inflict multiple punishments for a single incident and held that the court below reached the right result by concluding that indecency with a child is a lesser included of aggravated sexual assault of a child if both offenses are predicated on the same act. Evans v. State, 299 S.W.3d 138, 143 (Tex.Crim.App.,2009). In the case before the court now, there is only a single incident alleged to have happened and there are no facts to support that multiple incidences took place.

Appellee argues that the elements are not the same and thus not eligible to be considered as a lesser included offense, since the complaining witness asserted penetration of her mouth, while the defendant's version was that he touched her genitals. However, such a finding can be had under a functional equivalence test.

This court has held that "where an allegation in the indictment is not identical to an element of the lesser offense, the issue under Hall is whether the indictment's allegation is functionally equivalent to an element of the lesser offense." McKithan v. State, 324 S.W.3d 582, 588 (Tex.Crim.App.,2010). Since the courts have already held that touching is a lesser of penetration, it stands to reason that touching one place on the complainant's body would be the functional equivalent of touching the complainant somewhere else on the body, when whatever was alleged to have happened is said to have come from a singular incident.

When deciding whether to require a lesser included instruction, the best indicator of legislative intent is the "focus" or "gravamen" of a penal provision. In Garfias, this court analyzed a fact pattern where both felony murder and intoxication manslaughter both shared the same focus – the death of an individual – in determining that the legislature did not intend multiple punishments. Garfias v. State, 424 S.W.3d 54, 59 (Tex.Crim.App.,2014). Likewise, in this case, both aggravated sexual assault of a child and indecency with a child by contact both share the same focus – the alleged molestation of a child.

When considering the gravamen of the offense, this court has also said that, "The gravamen of the offense is: the "gist; essence; [or the] substance" of the offense (BALLENTINE'S LAW DICTIONARY 534 (3rd ed.1969)); "[t]he substantial point or essence of a claim, grievance, or complaint" (BLACK'S LAW DICTIONARY

817 (9th ed.2009)); "the part of an accusation that weighs most heavily against the accused; the substantial part of a charge or accusation." (WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 617 (1989))." Price v. State, 457 S.W.3d 437, 441 (Tex.Crim.App., 2015)

Since this case stems from two versions of a single incident, when considering the entire body of law that has come out of this court, the conclusion should be that the trial court erred in refusing to allow the lesser included charge to be presented to the jury. Since the Appellant was harmed by the judge's action, the proper remedy was for the case to be reversed and remanded for the defendant to be afforded a new trial.

PRAYER

WHEREFORE, PREMESIS CONSIDERED, Appellant prays that this Court affirm the findings of the court of appeals, deny the relief requested by Appellee, and order such other and further relief to which Appellant may be entitled.

Respectfully submitted,

/s/ Shana Stein Faulhaber

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing brief was served on the State Prosecuting Attorney's Office, PO Box 13046, Austin, TX 78711, by electronic transmission on February 17, 2021.

/s/ Shana Stein Faulhaber

Shana Stein Faulhaber

CERTIFICATE OF COMPLIANCE

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